IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF KENTUCKY

Commonwealth of Kentucky, on Relation of James W. Martin, Commissioner of Revenue,

Plaintiff

vs.

Morris Wholesale Liquor Distributing Co., Inc., a corporation,

Defendant.

MOTION FOR LEAVE TO FILE PETITION

EXHIBIT B.

Comes now the Morris Wholesale Liquor Distributing Co., Inc., a corporation, by Harvey H. Smith, its Counsel, and moves the Court to allow the filing of the intervention petition of George S. Houston, Blue Grass Liquor Company, Inc., Hargis Langdon, et al.

The grounds of this petition are that they are actual parties, to the controversy now between the Commonwealth of Kentucky, on relation of James W. Martin, and that it is necessary to protect their interests herein, in view of the conduct of Edward Morris an officer and stockholder in the Morris Wholesale Liquor Distributing Co., Inc.,

Respectfully submitted,

Harvey H. Smith, Attorney for Geo. S. Houston, Hargis Langdon, Harvey H. Smith, et al.

4th National Bank Bldg., Cincinnati, Ohio

Presented February 14th, denied after March 4th, order March 13, 1940. Wire sent by Western Union, March 4th demanding hearing—Record in C. C. of Appeals.

EXHIBIT C.

MOTION TO STRIKE RECEIVED FEBRUARY 13th, PRESENTED BY ANTHONY THOMSON FEBRUARY 14, 1940.

Ruled on by the Court Mar. 13, 1940, and to this is added Motion for Judgment and Motion for Summary Judgment, filed on April 9, 1940.

The vital part of these papers is the motion to strike, which if it had been presented on the record, it must have been acted on before March 4th and in it certain allegations were made.

The ruling of the court is as follows:

"Motion to Strike, the motion of Edward Morris to dismiss the Counter-Claim and answer heretofore filed in the above entitled cause, motion for judgment, motion for summary judgment, this cause having been by order of the court dismissed on the 4th day of March, 1940, it is ordered that the motion to file motion to strike, motion for judgment, and motion for summary judgment, is hereby overruled.

Signed: Mac Swinford, *Judge.*"

Certified: A. B. Rouse, *Clerk.*

March 13, 1940.

Motion to Strike filed Feb. 14, 1940.

STATE OF KENTUCKY
COUNTY OF FAYETTE
SCT.

The affiant, Anthony Thomson, says that he is a practicing attorney in the Commonwealth of Kentucky and in the Eastern District of Kentucky — United States District Court, and has been such for the past 15 years.

That on the 13th of February, 1940, he received from Judge Harvey H. Smith a motion to strike the motion of Edward Morris to dismiss the counter claim and answer heretofore filed in the case of J. W. Martin, et al, plaintiffs, vs. Morris Wholesale Liquor Distributing Company, Inc., defendants, which was then pending in the Eastern District of Kentucky at Catlettsburg. That said affiant took said motion (and this motion was for parties) to the United States Clerk at Lexington, where he had received the same and did offer to file with said Clerk the motion above mentioned. That under rule 5-A of the New Rules of Civil Procedure, the Clerk refused to accept and file said motion until copies had been delivered counsel for the other parties or notice of the filing accepted by respective counsel for the litigants.

That this affiant knew nothing of the case until he had received said motion by mail on said day, and affiant then returned to his office in Lexington and advised Judge Smith requesting the names and addresses of counsel for the parties to the said complaint.

Further affiant saith not.

ANTHONY THOMSON

Subscribed and sworn to before me by Anthony Thomson this the 21st day of February 1940. My commission expires June 28, 1943.

BETTY KENNEDY,
Notary Public,
Fayette County, Kentucky

Served by Dailey

Cincinnati, O.,
1940, Mar. 4th, A. M., 10 24

Judge Mac Swinford,
Cynthiana, Kentucky

Request no action Morris case until set down for hearing.

H. H. SMITH.

10:24
March 4th.

EXHIBIT D.

On April 8th, 1940, there was filed a response in the Circuit Court of Appeals by J. J. Leary, Attorney for Respondent, the Honorable Mac Swinford, (the same J. J. Leary who acted as attorney for J. W. Martin, and who was not by order of the said Judge Swinford, allowed to bring in H. Clyde Reeves, as a party plaintiff after six months had expired to revive and who continued J. W. Martin in said action by consent of court, without notice of any kind to H. H. Smith and who was the attorney signing the April 29th judgment settling the cause which was affirmed by the Honorable Mac Swinford Judge).

EXHIBIT F.

ORDER OF THE JUDGE, APRIL 15, 1940:

"This day came James W. Chapman, attorney for the Morris Wholesale Liquor Distributing Co., Inc., *and in compliance with the* order heretofore entered in the above styled case

offered for filing a Resolution signed by Irving Olin, Chairman of the Board of the Morris Wholesale Liquor Distributing Company, approving the action of Eddie Morris, Secretary-Treasurer of the Company, in dismissing the answer and counter-claim of the Company heretofore filed in this action, and agreeing to the entry of the agreed judgment in the above styled action, the resolution being sworn to by Irving Olin before Samuel Morris, Notary Public, Boyd County, Kentucky, the Court being advised, it is ordered that the Resolution be, and it is now filed and noted of record. (41 days after Judgment).

MAC SWINFORD, *Judge.*

April 15th, 1940

Certified:

A. B. ROUSE

A. B. ROUSE, *Clerk.*"

EXHIBIT G.

RESOLUTION PASSED APRIL 8th, 1940.
(After Judgment.)

EXHIBIT H.

CHAMBERS ORDER OF MAC SWINFORD, Judge.

"Came H. H. Smith and offered to file 'Motion to Dismiss.' "

The record, disclosed the following facts:

On February 9th, 1940 at Lexington, Kentucky the Court sat for the purpose of hearing arguments on various motions in this cause, the plaintiff was represented by J. J. Leary, the defendant was present by Edward Morris, duly authorized Secretary and Treasurer, and Harvey H. Smith attorney of record. (Words in parenthesis are counsels.)

The defendant through the said Edward Morris stated in open court that the Morris Wholesale Liquor Distributing Company was no longer an operating company, and had finally been dissolved. That H. H. Smith, attorney of record, no longer represented the defendant company. The request was made by the said Edward Morris in the form of a motion that the court dismiss the answer and counter-claim filed herein as of December 11th, 1939.

On March 4, 1940 an order was entered dismissing the counter-claim, cross petition and set off.

The "Motion to Strike" cannot be filed as part of this record and it is so ordered and adjudged to all of which H. H. Smith objects and excepts.

The Clerk is directed to make the "Motion to Strike" tendered but not filed, and placed with the record.

April 1st, 1940. MAC SWINFORD, *Judge.*

Certified (Signed) A. B. ROUSE, *Clerk.*"

EXHIBIT I.

ORDER MADE AT A PLACE NOT DESIGNATED TO HOLD COURT.

Cynthiana, Kentucky, March 4, 1940

"Honorable A. B. Rouse, *Clerk*
United States District Court
Lexington, Kentucky

Re: Commonwealth of Kentucky, etc. vs. Morris Wholesale Liquor Distributing Company, Cattlettsburg Docket

Dear Mr. Rouse:

I am enclosing herein an Order in the above styled case with two copies. You will please have a copy of this sent to the attorneys for both the plaintiff and defendant.

Most truly,

MAC SWINFORD, *Judge.*"

Refers to Order March 4th, without hearing. (See Rules 4 and 5).

EXHIBIT J.

"This cause was heard upon the petition for writ of mandamus, the show-cause order heretofore entered, and the response of the District Judge thereto, upon consideration whereof,

IT IS ORDERED AND ADJUDGED that the rule to show cause be and the same is discharged and the petition for writ of mandamus be and the same is dismissed.

Approved for entry:

(Signed) XEN HICKS, *Circuit Judge.*

FILED: APRIL 10, 1940" (Finally May 15th.)

EXHIBIT K.

NOTICE OF APPEAL DENIED

"I am this day in receipt of registered letter from you enclosing notice of appeal in the same case No. 1627, on the Catlettsburg Docket.

Yours very truly,

A. B. ROUSE, *Clerk.*"

(Returned)

(Ck. demanded for filing petition for parties —returned).

CHECK SENT FOR FILING OF PETITION FOR INTERVENTION RETURNED:

THE FIFTH THIRD UNION TRUST CO.
13-31 CINCINNATI, OHIO 13-31

Cincinnati, April 19, 1940 No. 161919

PAY to the Order of A. B. Rouse, U. S. Court Clerk
$10.00

FIFTH THIRD UNION TRUST $10 & 00 Cts.

CASHIER'S CHECK T. E. FORD,

A Cashier, Secretary-Manager."

EXHIBIT L.

UNITED STATES DISTRICT COURT
For The
Eastern and Western Districts of Kentucky

Chambers of Mac Swinford, Judge
Cynthiana, Kentucky, October 6, 1939

Mr. Harvey H. Smith
Attorney at Law
Fourth National Bank Bldg.
Cincinnati, Ohio

Re: Commonwealth, etc. vs. Morris Wholesale Liquor Distributing Company
Catlettsburg Docket No. 1766

Dear Sir:

This will acknowledge the receipt of your "Motion to Vacate Findings" and "Brief on Motion" with regard to Judge Swinford's recent Memorandum Opinion on the above styled matter.

You are advised that I am today forwarding your brief and motion to Honorable A. B. Rouse, Clerk, Lexington, Kentucky, for entry.

Most truly,

Davis T. McGarvey, *Secretary.*

(Not a valid order)
Copy to:
Hon. A. B. Rouse, Clerk
U. S. District Court
Lexington, Kentucky.

J. W. Martin had resigned at this order.

EXHIBIT M.

LAW OFFICES
of
CLIFFORD E. SMITH
Peoples State Bank Building
Frankfort, Kentucky

ASSOCIATE: Clyde E. Reed, S. M. Rosenstein, Joseph J. Leary.

General Counsel for: Commissioner of Revenue, Back Tax Section, Commonwealth of Kentucky.

March 2, 1940

Judge Harvey H. Smith,
Attorney at Law,
Fourth National Bank Bldg.
Cincinnati, Ohio

Re: Commonwealth vs. Morris Wholesale Liquor Distributing Company.

Dear Judge Smith:-

I enclose herewith copy of an order that I am today submitting to Judge Swinford for entry.

Very truly yours,

SAMUEL M. ROSENSTEIN

Leary, Smith and Rosenstein had no legal authority to represent the state.

SMR:Y

Encl.

See copy of order sent Judge Swinford by Rosenstein signed by the Judge, March 4, 1940 and wire.

EXHIBIT N.

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF KENTUCKY

COMMONWEALTH OF KENTUCKY, on relation of JAMES W. MARTIN, Internal Revenue Commissioner,

Plaintiff

vs.

MORRIS WHOLESALE LIQUOR DISTRIBUTING CO., INC.,

Defendant

MOTION FOR FINDINGS ON THE PART OF THE COURT.

Come now the petitioner, Morris Wholesale Liquor Distributing co., Inc., and Harvey H. Smith, counsel, and move the court for findings in this cause:

1. That the court set down this cause for hearing for the purpose of introducing evidence on the

right and claim of Edward Morris to represent Morris Wholesale Liquor Distributing Co., Inc., and discharge Harvey H. Smith, as attorney, and the purpose of showing collusion between the plaintiff, James W. Martin, et al, and the Commonwealth of Kentucky, with the said Edward Morris for the purpose of defeating and stopping this cause of action.

2. The said hearing to be for all purposes in connection with the prosecution of this action and the issues made by the pleading.

HARVEY H. SMITH, *Attorney*

for Morris Wholesale Liquor Distributing Co., Inc.,
Refused to make findings. (The Court).
Mailed, February 10, to Clerk.
Demand by wire for hearing March 4th.

EXHIBIT O.

UNITED STATES DISTRICT COURT
for the
Eastern and Western Districts of Kentucky

Chambers of Mac Swinford, *Judge.*

Cynthiana, Kentucky, April 22, 1940.

Honorable A. B. Rouse, Clerk
United States District Court
Lexington, Kentucky

Re: Commonwealth, et al. v. Morris Wholesale Liquor Distributing Co., Inc.
Catlettsburg Division

Dear Mr. Rouse:

I am returning herein the proposed "Order overruling Motion For New Trial," which you enclosed

with your letter of April 20th. This proposed order has no place in the record and I am therefore declining to sign it.

I have declined to consider any motions made by Judge Smith due to the fact that an Order heretofore entered in this case shows he is no longer the attorney of record. This order should be returned to him with a copy of this letter which is enclosed for that purpose. This letter should be placed with the record.

Most truly

MAC SWINFORD, *Judge.*

(No order entered discharging Judge Smith or substituting another attorney).

Encls.
MS:DM

NOTE: After dictating this letter Judge Swinford left the office and to avoid delay directed me to sign for him.

Davis T. McGarvey, *Secretary.*

EXHIBIT P.

UNITED STATES DISTRICT COURT
for the
Eastern and Western Districts of Kentucky

Chambers of Mac Swinford, *Judge.*

Cynthiana, Kentucky, October 26, 1939

Honorable H. H. Smith
Attorney at Law
Fourth National Bank Building
Cincinnati, Ohio

Mr. Clifford Smith & Associates
Attorneys at Law
Frankfort, Kentucky
Attention: Mr. J. J. Leary

Re: Commonwealth, etc. v. Morris Wholesale Liquor Distributing Co.
Catlettsburg Docket No. 1627

Gentlemen:

I have carefully examined the briefs and authorities in support of and in opposition to the defendant's Motion to Vacate the Findings of the Court. I find nothing to warrant me in sustaining this motion and an order may therefore be prepared and submitted overruling the defendant's motion.

Most truly,

MAC SWINFORD, *Judge.*

MS:DM

Order signed at Cynthiana. Martin resigned on July 1st.—No Subs.—Bound to sustain dismissal under Ky. law and rule 25 and Sec. 780.

EXHIBIT Q.

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF KENTUCKY

COMMONWEALTH OF KENTUCKY, EX REL, JAMES W. MARTIN,

Plaintiffs

vs.

MORRIS WHOLESALE LIQUOR DISTRIBUTING CO., INC.,

Defendants

MOTION FOR BILL OF EXCEPTIONS

Come now the Morris Wholesale Liquor Distributing Co., Inc., by Harvey H. Smith, with power of attorney, and Harvey H. Smith in person, and George S. Houston and Hargis Langdon as trustees, and move the court *for an order to settle the bill of exceptions* in this case, which motion is made upon the following grounds:

1. Whereas, the defendants desire to appeal this cause to the Circuit Court of Appeals for the Sixth Circuit, and desire that the record include all of the matters and things done in this case, all of the orders of the court, and the judgment, opinion, decisions of the court, and the files tendered to the court, and disallowed and allowed.

All of which to show the exceptions of the defendants to all of the orders and decisions, opinions and judgment of the court, to which the defendants except and which are adverse to the interests of the said defendants.

HARVEY H. SMITH,

Attorney for the Defendants and for himself,
510 Fourth National Bank Building
Cincinnati, Ohio.
CHerry 6772.
Mailed April 16th.

EXHIBIT R.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
CATLETTSBURG

Commonwealth of Kentucky, etc.,
et al

vs. No. 1627

Morris Wholesale Liquor Distributing
Co., Inc.,

ORDER

This day came Harvey H. Smith and offered for filing motion to file bill of exception, *and bill of exceptions,* in the above styled case. It appearing from the record that Harvey H. Smith is no longer an attorney of record for the defendant herein, the filing of the motion to file bill of exceptions, and the bill of exceptions, is hereby denied.

MAC SWINFORD, *Judge.*

April 17, 1940 Certified:

(Signed) A. B. ROUSE

A. B. Rouse, *Clerk.*

(Smith presented no Bill of Exceptions) (No order made as required by Kentucky and Federal law striking name of Harvey H. Smith at a hearing).

EXHIBIT S.

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF KENTUCKY
CATLETTSBURG

Commonwealth of Ky., by ex rel Martin,

vs. No. 1627

Morris Wholesale Liquor Distributing Co.

1938

June 1—Transcript from Franklin Circuit Court filed.

Aug. 2—Motion to dismiss attachment filed by deft.

Aug. 29—Motion to quash service and motion to dismiss petition and dissolve attachment filed. (No hearing).

Aug. 30—Motion to remand, filed by plff. (In default)

Dec. 31—Motion to remand overruled.

1939

Jan. 25—Second motion to dismiss tendered. (No service from a court with jurisdiction).

Sept. 29—Opinion of Court overruling all pending motions.

Oct. 9—Motion of deft. to be allowed to file motion to vacate findings of opinion. Order allowing same. Two motions to vacate findings filed. (Plff. in default).

Nov. 6—Order overruling motions to vacate findings. Order entered in accordance with opinion of Sept. 29, 1939, overruling motion to discharge attachment and other pending motions. (Plff. still in default).

Dec. 11—Motion of deft. to be allowed to file answer. Order allowing same. Answer and counter claim filed. (Jury demand — No reply filed).

1940

Jan. 17—Notice to take depositions of Saml. and Edw. Morris. Spa. issued.

Jan. 15—Motion to strike and to make more definite and certain filed. Motion for pre-trial conference filed. (No leave granted) — *objection.*

Feb. 9—Motion to vacate notice to take depositions, motion for judgment *pro confesso* on deft.'s counterclaim filed by deft.

Motion to dismiss for failure of proper parties. Statement of Edw. Morris filed. (No Auditor—No Plaintiff).

(*This record shows Continuous default*).

Commonwealth of Kentucky, by etc.

vs. No. 1627

Morris Wholesale Liquor Distributing Co.

1940

Jan. 17—Proof of service of notice to take depositions filed.

Jan. 15—Motion to strike and to make more definite and certain with memo. in support of same; motion for pre-trial conference filed by deft. Order filing same.

Feb. 9—Motion to vacate notice for depositions with affidavits of H. H. Smith and W. A. Schuberth. Motion for judgment pro confesso. Brief on same, all filed by deft. Order filing.

Motion to dismiss for want of proper parties, supplm. brief, filed by deft. Order filing. (Not passed on).

(No Auditor—No party plaintiff).

Motion to dismiss filed by deft. (Duplicate of above).

Statement filed by Edward Morris that H. H. Smith is no longer counsel for deft. and that James W. Chapman represents deft. Motion to dismiss counterclaim and set-off (made by Edward Morris).

Mch. 4—Order dismissing counterclaim, cross-petition and set-off, at cost of deft.

Mch. 12—Motion for finding of fact and proposed findings of fact tendered by H. H. Smith. Order overruling motion to file same. Exception. (Presented Feb. 14th, received not filed).

Mch. 13—Motion to strike motion of Edw. Morris to dismiss counterclaim, etc. heretofore filed; motion for judgment; motion for summary judgment; all offered by H. H. Smith and Anthony Thomson. Motion to file overruled. See Thomson sworn affidavit.

Motion for new trial, together with affidavits and copies of affidavits, copies of various motions and orders, offered by H. H. Smith. Motion for new trial, etc. ordered filed and set for hearing on April 1st, 1940, at 7:30 P. M. in Court Room at Covington.

EXHIBIT T.

Original of Williams Sworn Testimony Issue of Import Taxes:

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF KENTUCKY

COMMONWEALTH OF KENTUCKY, on relation of JAMES W. MARTIN, - - *Plaintiff*

vs.

MORRIS WHOLESALE LIQUOR DISTRIBUTING CO., INC., a Corporation of Catlettsburg, Kentucky, - - - - - - - - - - - - *Defendant*

TESTIMONY OF JOE WILLIAMS, SUPERVISOR OF TAXES OF KENTUCKY.

September, 1939.

Statement of Joe Williams, Tax Supervisor for the State of Kentucky, made on oath in a proceeding between the Kentucky Alcohol Beverage Control Board and Morris Wholesale Liquor Distributing Co., Inc.:

Q. Joe, how much import taxes has the Morris Wholesale Liquor Distributing Co., Inc., paid to the State of Kentucky?

A. I could not tell you from my own knowledge.

Q. You gave me the figures before.

A. I can get them and put them into the record.

Q. And also the tax. You will put that in the record?

A. Yes, sir, I will be glad to do that.

Mr. Williams thereafter inserted in the record $9130.00 import taxes. He also described the manner that the tax was collected in substance, as follows:

"Inasmuch as the law provides that a Kentucky importer must pay the import tax and have a permit in his possession before the merchandise is imported, we have adopted a sys-

tem of having the Kentucky importers purchase permits from the Department in advance, at which time they pay the import tax upon the quantity of merchandise called for in the permit. These permits are issued in triplicate, one copy is kept by us, one sent to you, and the third copy to the out-of-State shipper, or to you, depending upon your request. The out-of-State shipper must deliver the copy we send to him, along with the merchandise for transportation, and when the whiskey which is imported is delivered in Kentucky, he must endorse the copy of his permit so as to specify the exact amount of whiskey delivered. The permit may be used until the full quantity called for upon the face of the permit has been shipped. The copy of the permit must be returned to the Department within ninety (90) days, but we will give you credit on any unused balance."

(Hearing in May to cancel license).

I hereby certify that this is an exact copy of the testimony of Joe Williams, tax supervisor of Kentucky, in the above entitled case.

H. H. SMITH.

Subscribed and sworn to before me by H. H. Smith, this 30th day of April, 1940.

ELSIE DEWALD, *Notary Public*

My Commission expires
October 29, 1940.

United States District Court

(Certified: A. B. Rouse, Clerk)

"I am now represented by attorney J. W. Chapman, of Ashland.

(Signed) ED MORRIS."

He then filed a motion to dismiss the counter claim, makes a statement in court that the corporation has been dissolved, and on April 1st, 1940, the court makes the finding that the corporation has been dissolved, but in fifteen days thereafter receives evidence of a resolution from said corporation affirming his opinion on March 4th, 1940.

Auditor must proceed under said section providing penalty—Six months statute put the plaintiff out. All motions (four) denied for want of parties—Judgment, "Y" void;

EXHIBIT I.

Petitioners allege:

March 13th, 1940 this Honorable Judge entered an order dismissing motion to strike motion of Ed Morris to dismiss counter claim of petitioners by Morris Wholesale Liquor Distributing Company and gave as his reason:

> "This day came Anthony Thomas and Harvey H. Smith, signing as attorneys for parties defendant, Morris Wholesale Liquar Distributing Company, Inc., and offered for filing Motion to strike the motion of Edward Morris to dismiss the counter claim and answer, heretofore filed in the above mentioned cause,
>
> Motion for Judgment,
>
> Motion for Summary Judgment,
>
> this cause having been by order of *the court dismissed* on the 4th day of March, 1940 it is ordered that the motion to file
> 'Motion to strike,
> Motion for judgment
> and motion for Summary Judgment', be overruled."

THESE MOTIONS WERE NOT FILED THAT DAY, but Feb. 14th, 1940, under *Rule* 5; and the COURT never made any order March 4th dismissing counter claim, because no MOTION was filed by the corporation nor any legally authorized person, and the COURT was not in session that day, petitioners are informed, but said order was made by the *Judge at Cynthiana,* a place, not by law, where a judgment can be rendered.

RULE 5: "judge may permit the papers to be filed with him, in that event he shall note thereon the *filing date,* and *forthwith transmit them to the office of the clerk".*

Did it take him from Feb. 14*th to March* 13*th ?* or what ? "all papers required to be served on a party shall be filed with the Court EITHER BEFORE SERVICE *or within a reasonable time thereafter." Did the Clerk give Thomson a correct reason Feb.* 14*th?*

"But no service need be made on parties in default."

Petitioners say that the "Motion to Strike" seemed to have confused the JUDGE, for again on April first he singled it out for a different reason:

"The court being of the opinion that H. H. Smith has no authority to further represent the defendant (Morris Wholesale Liquor Distributing Company) the "Motion to Strike" cannot be filed as part of this record, and it is so ordered and adjudged, to all of which H. H. Smith objects and excepts. The Clerk is directed to make the "Motion to Strike, tendered but not FILED, and placed with the record" April 1st, 1940, Certified (signed) A. B. Rouse, Clerk

MAC SWINFORD, Judge.

SO THE MOTION TO STRIKE OFFERED FEB. 14th was never filed as Rule 5 provides it must. No hearing had, either, on it.

BUT this remarkable order of April 1st, further recites:

Finding of FACTS (letter of Judge March 4th, says there was none.)

But according to the Judge he was getting facts. WE QUOTE:

> "and that the STATEMENT of Edward Morris made in open court at Lexington, Kentucky, on February 9th, 1940 was *re-affirmed* by him personally and James W. Chapman, and that it was the will of the defendant company which WOULD be indicated to the court, by filing with the record, within a few days a resolution expressly providing that said corporation ratified and approved the statement of Edward Morris heretofore referred to, and further, that H. H. Smith, did not represent the defendant company, and that the defendant company desired to dismiss its counter claim heretofore filed, the court being of the opinion that H. H. Smith has no authority to further represent the defendant."

Thus there were findings, but based on what? Where is there in this case a *first affirmation?* Where did he get the evidence to make a *finding of fact,* that H. H. Smith did not represent the corporation?

EVIDENCE MUST BE SWORN TO IN KY.

Mr. Smith, Feb. 9th, 1940. *"I demand this witness be sworn."* The court refused:

March 4th, Cincinnati, Ohio. Judge Mac Swinford, Cynthiana, Ky.

"Request no action in Morris case until set down for hearing." (Hearing denied).

H. H. Smith.

In the first place, Chapman was not present Feb. 9th, and signed *no motion to dismiss,* but Ed Morris signed it. The evidence was to be furnished in a few days according to the Court's finding, but no chance given to show it was affirmed to the Court falsely.

Mr. H. H. Smith must have a day in court to show his contract with the Corporation, which excluded Ed Morris of the right or Chapman to appear in the case. The Court refused to hear this matter. The *Motion to Strike* was the *heart of the deal from head to heel.*

Section 97 Kentucky Code provides: (quoted in substance)

"Proceedings upon cross actions shall be the same as those upon petitions; and if the issues are of a common law nature made by the petition the issues must be tried to a jury."

Doyle vs Offitt, 135 Ky-7th Amendment Constitution U. S.

"The right of a TRUSTEE (Houston and Langdon) to intervene is absolute."

Swift vs Black Panther Oil Co. 244 Fed. 20 Rule 37.
Western Union vs Mex. Trust 221 Fed. 545, 91 Fed. 570.

"The foreclosure of a mortgage or lien presents absolute right.

Louisville Trust Company vs Louisville Railway Company 174 U. S. 674."

Judge Swinford denied filing of motion and later petition.

(Following Letter)

United State District Court
Office of the Clerk
Eastern District of Kentucky.

Lexington, Kentucky, April 30th, 1940

Mr. Harvey H. Smith
Attorney at Law
Fourth National Bank Building
Cincinnati, Ohio

Commonwealth of Kentucky vs Morris Wholesale Liquor Distributing Company
No. 1637 on the Catlettsburg Docket

Dear Sir: You will receive a copy of a letter signed by Judge Swinford addressed to me, directing that the intervening petition of George S. Houston, et al be returned to you.

I am complying with that request by returning the petition, the copy, and the cashier's check of the Fifth-Third Union Trust Company, for $10.00

Yours very truly,

Signed—A. B. ROUSE, Clerk

ABR:LR

Here is finally a flat refusal by the Judge after a planned effort from Feb. 14th to get a ruling, and therefore a denial of a fixed constitutional right.

(1) Intervention or substitution is a matter of right any time during the term of court. See Kentucky Codes 20 to 28.

Clifford Smith could not appear at any time as counsel. 112-5, Ky. Stat.

NO AUTHORITY

No. 2.

Judgment (in Kentucky) without revivorship is void."

Asher vs Fordson Coal Co. 249, Kentucky, 498-7.

Fordson Coal Company vs Jackson 7 Federal (2) 117. (6th Circuit.)

Sackett vs Grinstead 176 Ky. 91.

Murphy vs Fryer I. Kentucky Reporter 348.

"Cannot be done by agreement, must be done by order of the court according to Code-section 503 —Statute, sec. 999."

Williams vs Thompson, 80 Ky. 325.

Baker vs Davis 221 Ky. 527.

"Summons must issue on petition to revive." Barth vs Barth 102 Ky. 56, Code 501-2-3.

Fishback vs Green, 87 Ky. 107-112.

"Within 30 days after service action may be revived, if six months has expired when petition is filed and service had."

Louisville, vs U. S., 97 S. W. 1096.

"Code must be complied with unless adversary agrees, and if such an agreement is made may be revived after 12 months."

Apperson vs Fulkerson, 7 Ky. Reporter 452.
Asher vs Fordson Coal Company, 249 Ky. 498.

"Unless Revivorship shows on the record judgment entered is void and no appeal lies from a void judgment."

Sixth Circuit Court of Appeals.

Fordson vs Jackson 7 Fed. (2) 117 and 89 Ky. 182. 508-510 Ky. Code.

We allege the Fed. Rule to be the same.

"The successor must adopt the attitude of his predecessor and insist on enforcement of the statute questioned and come in within six months by petition." Rule 25.

Davidson vs Rafferty 39 Fed. (2) 1022.

The rule applies to an action, suit or other proceeding, and all proceedings thereafter (the time to revive). If the revived action in the name of the second officer is had and he continues to threaten with the enforcemer[illegible]f the same statute he is liable.

Gorham Mfg. Co. vs Wendel; 261 U. S. I.

The party affected by substitution must be served and may make his objections. The action abates, no motion to abate is necessary.

Black—71-F. (2) 536.

Martin vs Coe 83 Fed. (2) 606. (Dismissed.)

Petition of Intervention—Motion Denied, presented Feb. 14th, 1940.

Intervention petition must be first filed as in other proceedings in original action, then served by

summons, which is a matter of right and not a matter of discretion.

Section 501 Ky. Code.

Federal Act of Feb. 13th, 1925.

Leary vs. Admr. 224, U. S. 567.

"If the decree interfere with a contract previously made, the actual parties have a right to intervene.

279 U. S. 556, 51 Federal (2) 757.

EXHIBIT Y.

Final Judgment, no party Plaintiff or Defendant here—No Jurisdiction. Smith denied notice. — Atty. Gen. Absent.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF KENTUCKY. At Catlettsburg

COMMONWEALTH OF KENTUCKY,
by and on relation of James W.
Martin, Commissioner of Revenue, - - *Plaintiff,*

vs. No. 1627. JUDGMENT
Filed and entered April 29, 1940.

MORRIS WHOLESALE LIQUOR
DISTRIBUTING CORPORATION,
a corporation, - - - - - - - - - - *Defendant*

This cause coming on for hearing, the parties being duly before the Court and the defendant previously having moved the Court to dismiss its counter claim, cross-petition and set-off and the same having been sustained and an order having been entered to that effect on March 4th, 1940, and the parties

having agreed as to a settlement of the claim of the plaintiff herein, it is now ordered and adjudged by the Court that the plaintiff, Commonwealth of Kentucky, by and on relation of James W. Martin, Commissioner of Revenue, recover judgment against the defendant, Morris Wholesale Liquor Distributing Company, a corporation, in the amount of Five Hundred ($500.00) Dollars, and its costs herein expended.

It is further considered, ordered and adjudged that all costs and expenses incurred in connection with the prosecution of this cause in the Franklin Circuit Court of Kentucky and this Court, including the storing and warehousing of the whiskey levied upon pursuant to an order of attachment issued by the Franklin Circuit Court, shall be paid by the defendant.

The parties having agreed, it is further considered, ordered and adjudged by the Court that E. K. Rose, Sheriff of Boyd County, Kentucky, is hereby authorized and directed, upon receipt of a written authorization from the Commissioner of Revenue of the Commonwealth of Kentucky and upon payment of the costs due said E. K. Rose, Sheriff of Boyd County, Kentucky, including storage and warehousing charges, to deliver to the person named in said written authorization, at the place in Boyd County, Kentucky where said whiskey is stored, any and all whiskies, wines and cordials that were taken into possession by said E. K. Rose pursuant to an order of attachment issued by the Franklin Circuit Court in the case of Commonwealth of Kentucky, by and

on relation of James W. Martin, Commissioner of Revenue, v. Morris Wholesale Liquor Distributing Company, a corporation, on March 24, 1938. It is understood and agreed that as a part of the settlement of this cause that the defendant shall be and it is hereby authorized to sell said whiskies, wines and cordials now in the possession of E. K. Rose, Sheriff of Boyd County, upon which evidence is noted on the package that the Internal Revenue Laws of the United States have been complied with, to a person authorized by the laws of Kentucky to receive same, and upon receipt of a notice from the defendant advising the Department that said sale has been effected to a person legally authorized, the Commissioner of Revenue shall, after an investigation discloses that the purchaser is authorized to purchase same, cause to be delivered to the defendant the written authorization hereinbefore provided for the removal of said whiskies, wines and cordials from the custody of E. K. Rose.

This judgment is to be treated as a full and complete settlement and adjustment of all claims asserted by the plaintiff against the defendant herein and of any and all claims that the defendant has asserted or may have against the plaintiff and James W. Martin and H. Clyde Reeves.

MAC SWINFORD ,

Judge, United States District Court for the Eastern District of Kentucky.

Agreed to and approved for entry: 4-29-40.

H. CLYDE REEVES, Commissioner of Revenue.

Clifford E. Smith, J. J. Leary, Saml. M. Rosenstein.
Attorneys for Plaintiff.

James W. Chapman, Attorney for Defendant.

NOTE: Harvey H. Smith was not notified of this hearing, tho his name not stricken as attorney, and no hearing had as to his right to appear. No Auditor's attorney signs here. No. Atty. Gen.

UNITED STATES OF AMERICA
EASTERN DISTRICT OF KENTUCKY
SS:

I, A. B. Rouse, Clerk of the United States District Court in and for the Eastern District of Kentucky, do hereby certify that the annexed and foregoing is a true and full copy of the original Judgment entered and filed April 29, 1940, in the case of Commonwealth of Kentucky, by and on relation of James W. Martin, Commissioner of Revenue, vs. Morris Wholesale Liquor Distributing Co., No. 1627 on the Catlettsburg docket of this Court, now remaining among the records of the said Court in my office.

IN TESTIMONY WHEREOF, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at Catlettsburg, this 16th day of May, A. D. 1940.

A. B. ROUSE, *Clerk.*

(S E A L)

By Augusta Rogers
Deputy Clerk.

Attorney General of Kentucky is, with the Auditor a necessary party and only attorney who can appear in this cause for the Commonwealth of Kentucky Statute—112-5.

Com. vs Roberta Coal Co., 186 Ky. 409.

McAlexander vs Wright, 3 AKM 189.

Com. vs. Louisville Property Co., 128 Ky. 790.

Chesapeake vs. Raskamp, 179 Ky. 175.

Sec. 1622 (Auditor) Statute Control License Beverage Act. Sec. 10 of 1934.

Harvey H. Smith deposes and says that as counsel of record and attorney in the courts of record in Kentucky , he has examined the petition herein, and that he affirms it states the facts and a cause if action for a Writ of Certiorari.

HARVEY H. SMITH,
Counsel for Petitioners.

End